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No. 91-1188

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES ROWLAND, et al., Petitioners,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

PETITIONERS' REPLY BRIEF ON THE MERITS

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PETITIONERS' REPLY BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

Petitioners[1], in answer to two new points raised by respondent, first deny that the relevant legislative history should be ignored by this Court on the basis of respondent's restrictive and inflexible formulation of the plain-meaning rule. Petitioners argue that the legislative history should be utilized in the same manner and fashion

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1. At various points in its brief, respondent refers to petitioners as "the State". E.g. Resp. Brf. on the Merits at 18, 20, 22-24, 31, 34-35, 37, 39-40. However, the State of California is not a party defendant in the original complaint (E.R. 1, 5-6), and in any case a state, its agencies, or its officials acting in their official capacities may not be sued under section 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 67, 71 (1989).

as every other court has used it, including the lower court in this case.

Secondly, respondent's argument that to deny associations in forma pauperis status would be unconstitutional is not before this Court, the issue having not been considered by the lower court or included in the grant of certiorari issued by this Court.

Finally, the legislative history shows nothing but silence on the part of Congress as to whether associations may proceed in forma pauperis. Respondent seeks to interpret this silence as positive intent on the associations issue. This offends common sense. The cluster of complex and unsolved issues which arise from the adoption of respondent's interpretation and remain unsolved also shows that not a moment's time was spent by Congress on the subject. The absence of any provision for the numerous procedural problems, including the test of indigency for an association, indicates a lack of intent to deal with the subject at all. In any case, the assumption of an omniscient Congress is particularly unwarranted under the facts of this case and the anomalous decision of the lower court must be reversed.

ARGUMENT

I. THIS COURT IS NOT RESTRICTED TO CONSIDERATION OF THE WORDS OF THE RELEVANT STATUTES AND MAY CONSIDER LEGISLATIVE HISTORY IN DETERMINING WHETHER AN ASSOCIATION MAY PROCEED IN FORMA PAUPERIS

Respondent, while conceding that there is relevant legislative history, argues that this Court should not consider it. Rather, respondent asks that this Court reach a decision based only the words of the relevant statutes. There are both legal and practical reasons for ignoring such a harsh exclusionary rule. Resp. Brf. on the Merits at 18-19.

There is no authority which would absolutely bar consideration of the legislative history. Even the most basic general principles of statutory construction must yield to clear contrary evidence of statutory intent. Nat. Railroad Passenger Corp. v. Nat. Assn. of Railroad Passengers, 414 U.S. 453, 458 (1974). When aid to construction of the meaning of words is available, there can be no rule of law which forbids its use, however clear the words may appear on superficial examination. Cass v. U.S., 417 U.S. 72, 78-79 (1974). As stated in Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 454-455 (1989):

Even though, as Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Cabell v. Markham, 148 F.2d 737, 739 (CA2), *aff'd*, 326 U.S. 404 (1945). Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." Boston Sand & Gravel Co. v. [U.S.], 278 U.S. 41, 48 (1928) (Holmes, J.).

The plain-meaning rule "does not require a court to operate under an artificially induced sense of amnesia about the purpose of legislation, or to turn a blind eye towards significant evidence of Congressional intent in the legislative history." Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 871 (9th Cir. 1981). It simply makes no sense to pretend there is no legislative history pertinent to this case. Every lower court which has discussed the issue has considered the legislative history

and has opined in light of that history. FDM Mfg. Co. v. Scottsdale Insurance Company, 855 F.2d 213, 214 (5th Cir. 1988); SOUP Inc. v. FTC, 449 F.2d 1142, 1143 (D.C. Cir. 1971); Sears Roebuck & Co. v. C.W. Sears Real Estate, 686 F.Supp. 385, 388 (N.D. N.Y. 1988), *aff'd*, 865 F.2d 22, 23 (2d Cir. 1988); MOVE Organization v. U.S. Dept. of Justice, 555 F.Supp. 684, 691 (E.D. Penn. 1983); Harlem River Consumers Coop. v. Associated Grocers, 71 F.R.D. 93, 96 (S.D. N.Y. 1976); River Valley, Inc. v. Dubuque County, 63 F.R.D. 123, 124 (N.D. Iowa 1974); Honolulu Lumber Co. v. American Factors Ltd., 265 F.Supp. 578, 580 (D. Hawaii 1966), *aff'd. on other grounds*, 403 F.2d 49 (9th Cir. 1968).[2/]

Indeed, the lower court in this case found it necessary to review the legislative history despite its ultimate holding that the language of the statute was intended to permit associations to proceed in forma pauperis. CMC Unit II, Men's Adv. Council v. Rowland, 939 F.2d 854, 856, 858 (9th Cir. 1991) [hereinafter "CMC"]; compare Sears Roebuck & Co. v. C.W. Sears Real Estate, 686 F.Supp. 385, 388 (N.D. N.Y. 1988), *aff'd*. 865 F.2d 22, 23 (2d Cir. 1988) [section 1915(a) not

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2. Atlantic S.S. Corp. v. Kelley, 79 F.2d 339 (5th Cir. 1935) and Quittner v. Motion Picture Producers & Distributors of America, Inc., 70 F.2d 331 (2d Cir. 1934) were issued before the 1959 amendment to section 1915(a) and therefore contain no discussion of the legislative history of that amendment.

unambiguous on its face and therefore the court must seek guidance from the legislative history]. The legislative history, being in the record and clearly the focus of any serious discussion of the issue at hand, should inform the decision of this Court in the manner outlined in Petitioners' Brief on the Merits at 11-17 and Argument III, *infra*.

II. RESPONDENT CANNOT NOW RAISE THE ISSUE OF WHETHER THERE IS A CONSTITUTIONAL ASPECT TO THE DENIAL OF IN FORMA PAUPERIS STATUS TO ASSOCIATIONS, THAT ISSUE NOT HAVING BEEN DECIDED BY THE LOWER COURT OR INCLUDED IN THE GRANT OF CERTIORARI ISSUED BY THIS COURT

Whether associations have a constitutional right to proceed in forma pauperis was raised by respondent[3/] in the lower court but, as it concedes, this claim was not considered by the lower court. Resp. Brf. on the Merits at 25, n. 21; CMC at 859. Therefore, this issue should not be considered now. Yee v. City of Escondido, 503 U.S. ___, 112 S.Ct. 1522, 1531 (1992); Youakim v. Miller, 425 U.S. 231, 234 (1976). Moreover, the issue was not included as one of the issues to be determined in the grant of certiorari. Consequently, under Rule 14.1(a) of this Court's rules, this issue should not be considered by this Court. See Yee v. City of Escondido, 112 S.Ct. at 1532-1533; e.g., Beck v. Washington, 369 U.S. 541, 554 (1962).

3. Petitioners answered these arguments in the lower court. Appellees' Brief, No. 90-55600, at 8-9.

III. RESPONDENT HAS NOT DEMONSTRATED THAT SECTION 1915(A), READ WITHIN THE CONTEXT OF THE RELEVANT LEGISLATIVE HISTORY, CAN FAIRLY BE INTERPRETED TO MEAN THAT CONGRESS INTENDED ASSOCIATIONS TO PROCEED IN FORMA PAUPERIS

This case is beset by respondent's assertions of artificial conventions, maxims, and strictures. For example, contrary to common sense, respondent asks this Court to completely ignore all legislative history on the basis of a very restricted formulation of the plain meaning rule.[4/] See Argument I, *supra*. The same artificiality

4. Another example is respondent's attack on the Atlantic S.S. Corp. case. See n. 1, *supra*. Both Quittner and Atlantic S.S. Corp. are cases from the 1930's which stand for the proposition that prior to the 1959 amendment, corporations could not proceed in forma pauperis. Respondent now tells us that Atlantic S.S. Corp., a 57-year old case, was wrongly decided because a 1809 case upon which Quittner supposedly turns was reversed in 1844. Resp. Brf. on the Merits at 21-22.

The true story is set forth in Navarro Savings Assn. v. Lee, 446 U.S. 458, 461, n. 7 (1980) and may be summarized as follows: Bank of U.S. v. Deveaux, 5 Cranch 61, 86-87, 91 (1809), *overruled*, Louisville, C., & C.R. Co. v. Letson, 2 How. 497 (1844), *resurrected*, Marshall v. Baltimore & Ohio R. Co., 16 How. 314 (1854), *obviated*, 28 U.S.C. section 1332(c)(1). In any case, the exclusive

informs respondent's argument regarding the meaning of the legislative history.

Respondent argues that the legislative history demonstrates that Congress wished to include associations within the meaning of "person" in section 1915(a) because Congress must be assumed to have considered all aspects of the statutory modification it was then contemplating. Resp. Brf. at 13-14, 22. On the other hand, petitioners note that the absence of any shred of evidence regarding Congress's consideration of this point, let alone its intent, hardly constitutes evidence in respondent's favor. See Ngiraingas v. Sanchez, 495 U.S. 182, 187, 189 (1990). It seems anomalous to predicate intent on the basis of precisely the silence which would indicate a lack of intent to most reasonable readers of the legislative history.

Courts are not free to fashion policy in Congress' name when Congress has been silent. "Ordinarily, 'Congress' silence is just that -- silence.'" Community for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989).

subject of these cases is the citizenship of a corporation, if any, for diversity purposes and the reference to Deveaux is hardly crucial to the holding in Atlantic S.S. Corp.

Respondent's rarefied academic discussion is of no consequence. Atlantic S.S. Corp. is now mainly of historical importance to show that all courts of appeal, both prior to and after the 1959 amendment, have held that corporations may not litigate in forma pauperis with the exception of the Ninth Circuit in the instant case.

legislative . . . silence." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980). As Justice Stevens has stated: "The Court is sometimes skeptical about the meaning of a statute that appears to make a major change in the law when the legislative history reveals a deafening silence about any such intention." Stevens, The Shakespeare Canon of Statutory Construction, 140 U. Pa. L. Rev. 1373, 1382 (1992).

Moreover, respondent postulates an idealized Congress which must have considered all implications of the amendment in question. This omniscient Congress would surely have foreseen the numerous practical problems of administration pointed out earlier by petitioner and provided a remedy for them. Pet. Brief on the Merits at 17. It clearly did not.[5/] Any recognition or

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5. Respondent seeks to minimize these problems, but a fair reading of petitioners' discussion of these problems would indicate they are so myriad and diverse that an omniscient Congress could not possibly have intended to leave these problems without solution.

Respondent assures us there is no problem in assessing the indigency of the association or its individual members, assuming that our courts will eventually agree as to whose indigency must be assessed, the association, its members, or both, and how those assets are to be reported and verified. Resp. Brf. on the Merits at 32-33. He entrusts the determination of these procedural matters to the courts and discounts the chaos which will prevail among the circuits before a single formula is agreed upon. However, the affidavit of poverty submitted in the instant case illustrates that matters are not that simple. The

parties are unable to agree whether the individual filing the affidavit is speaking of his own resources or that of the organization he belongs to. E.R. 43-44; compare Resp. Brf. on the Merits at 3, n. 3; Pets. Brf. on the Merits at 6. This problem is the natural result of the confusion between organization and individual which is the hallmark of the procedural issues engendered by CMC.

Respondent continually seeks to slough off the issue of indigency determination. Yet the essence of in forma pauperis is that only the poor should be served by the statute and the definition of whom the poor are is the key to the benefits of section 1915. The problem is essentially that of piercing the corporate veil.

> In addition to [the] legislative history, another consideration weighs against permitting corporations to reap the benefits of section 1915. If corporations were allowed to proceed in forma pauperis, there would exist the prospect that stockholders . . . might try to hide behind a corporate veil in order to avoid the costs of litigation.. This danger was touched upon in MOVE Organization, 555 F.Supp. at 691, and Honolulu Lumber, 265 F.Supp. at 581. That such a scenario would arise is so obvious that it is doubtful that Congress would not have provided some guidance to the courts concerning how deeply they should look behind the corporate structure to determine indigence
>
> if it truly intended corporations to reap the benefits of the statute.

Sears Roebuck & Co. v. CW Sears Real Estate, 686 F.Supp. at 388; see Appellees' Brief, No. 90-55600, at 5-7.

Respondent is equally sanguine about all aspects of the procedural problems raised by petitioners. It assures us that because pro bono representation is recommended by the American Bar Association, counsel will be available for litigating organizations. Resp. Brf. on the Merits at 38, n. 31. The experience of trial courts, even in an age when there is a glut of lawyers, is to the contrary.

Respondent tells us that there will be no explosion of cases, based solely on the fact that only a handful of organizations have applied for in forma pauperis status since 1959. Resp. Brf. on the Merits at 39-40. It ignores the fact that all circuit court precedent since 1959, with the exception of the instant lower court opinion, held that such actions could not be maintained.

As to the numbers of association cases to be anticipated, respondent suggests that dishonest suits be deemed frivolous under section 1915(d) but offers no reason why this provision would deal with the situation where the causes of action are meritorious but are presented by an organization of uncertain origin, assets, and aims. Resp. Brf. on the Merits at 40. It suggests that a decrease in filings might result if one organizational suit replaced several individual ones. Id. This is a tacit acknowledgement of one area of abuse, the evasion of class action requirements through the use of an organization plaintiff. Finally, as stated in Petitioners' Brief on the Merits at 19, 22, there are significant standing and discovery issues raised by the lower court decision.

appreciation of these problems is absent from the legislative history and amended statute.

The presumption of an omniscient Congress is particularly ludicrous under the circumstances in this case. Indeed, this case reinforces another model of Congress, one that is less than all-knowing, susceptible at least to sins of omission, and capable of acting with "sheer inadvertence". Cass v. U.S., 417 U.S. at 83. This Congress might well have been so narrowly focused on the issue of aliens being denied in forma pauperis status that it did not consider whether the modification from "citizen" to "person" would also affect associations. This model has the advantage of squaring with the real world.

Congress meant only one thing when it amended the statute. That intent was to extend the benefits of section 1915(a) to resident aliens.

> This legislative history is convincing. We would be impermissibly reading more into the statute than Congress intended if we were to hold that the 1959 amendment added corporations as well as aliens to the list of those entitled to seek [in forma pauperis] status.

FDM Mfg. Company v. Scottsdale Ins. Co., 855 F.2d at 214. The Ninth Circuit's extension of section 1915(a) on the basis of this single-minded legislative history is simply building policy upon a fiction or pretext. Our courts are not committed to decision by maxim or presumption and such an inflexible approach must be eschewed.

CONCLUSION

Respondent's brief on the merits provides no basis for upholding the erroneous opinion of the lower court and therefore, this Court should reverse the holding of the Ninth Circuit.

DATED: June 8, 1992

Respectfully submitted,

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CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On June 10, 1992, I served the attached **PETITIONER'S REPLY BRIEF ON THE MERITS** in Rowland, et al. v. California Men's Colony, Unit II Men's Advisory Counsel, No. 91-1188, by placing a true copy thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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Subscribed and sworn to before me this 10th day of June, 1992.

Lucinda Seaton
Notary Public in and for said County and State

LUCINDA SEATON
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County of Sacramento
My Commission Expires 2/3/95